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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

12 CR 376 (RMB)

5 RUDY KURNIAWAN,

6 Defendant.

7 -----x

8 New York, N.Y.

9 July 24, 2014

11:45 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
17 Southern District of New York

18 STANLEY J. OKULA

Assistant United States Attorney

19 JEROME MOONEY

VINCENT S. VERDIRAMO

Attorneys for Defendant

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(Case called)

THE COURT: Let me note just at the outset, Counsel, I've been handed a document called "Consent Preliminary Order of Forfeiture as to Specific Properties/Money Judgment." It's a forfeiture order in the amount of \$20 million, and it's signed by Mr. Adams for the government, by Mr. Kurniawan, and by Mr. Mooney as his counsel.

Is that your understanding, that this is to be entered into this case?

MR. OKULA: Yes. Your Honor had requested that the parties, if you will, settle or bring to the Court's attention whether there were any outstanding issues with respect to the forfeiture. We had alerted the Court that we had presented the defense with the consent order. I understand that now with the defendant's signature on it, that this essentially resolved, with the Court's imprimatur, the issues relating to forfeiture.

THE COURT: Mr. Mooney, is that your understanding as well?

MR. MOONEY: That is, your Honor.

And just to also clarify the record, we wanted to make sure that -- to clarify, that there's a list of assets that are contained within that order. Many of those assets are no longer in Mr. Kurniawan's possession -- they have been sold or gone other places -- and it is, of course, our understanding and confirmed by the government that they understand that he

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1 doesn't necessarily have all of these things, and the
2 forfeiture only extends to the extent that he still has an
3 ownership, or control, or possession of the assets.

4 THE COURT: And, Mr. Kurniawan, you signed this
5 document this morning after conferring with counsel?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: OK.

8 One small thing. I notice that it's not dated next to
9 Mr. Kurniawan's signature. May I put in today's date in that
10 space?

11 MR. MOONEY: Yes, please, your Honor. He did sign it
12 just a few minutes ago.

13 THE COURT: Right. I'm going to insert July 24, 2014.

14 And then just for the record, let it be clear that I
15 have also signed and dated myself this order of forfeiture.
16 So, that will be posted on the docket as part of the record.

17 So just let me just outline where we are going. And
18 those of you who can't stay the whole time, you're welcome to
19 come and go as you please. By prearrangement, we have a few
20 things to accomplish. One relates to the issue of loss,
21 possibly restitution, that remains unresolved. There was an
22 application by the defense for what's called a Fatico hearing
23 on this subject.

24 I determined that since the submissions -- the written
25 submissions in the record had been so voluminous on the issue

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1 of sentencing -- and helpful, I might add, there's at least a
2 dozen letters between the government and defense counsel,
3 roughly, even maybe the government has a couple more,
4 Mr. Mooney, than you do, but not much. So it's so extensive, I
5 have so much information, that I don't think a full-blown
6 evidentiary hearing is necessary, but I did say that I would
7 allow the lawyers up to a half hour each to address that issue.

8 And after we finish that, we will take a brief pause,
9 and then we will proceed to the sentencing.

10 And just one other thing that you should be aware of:
11 There is an issue of -- and I will explain in more detail what
12 this means -- loss restitution that likely won't be resolved
13 today and for which we have set a Tuesday afternoon, next week,
14 set aside to hear that discussion. That relates to an entity
15 called Mission Fine Wines. And the lawyers may have more to
16 say about that even today, but in the event that we don't
17 resolve that issue today, we will resolve that issue on
18 Tuesday, but it's my estimation -- correct me if I am wrong,
19 Counsel -- that however we resolve that issue is unlikely to
20 impact the sentence that's imposed today; that is to say, it's
21 unlikely to affect either the sentencing guideline range, or
22 the offense level, or the amount of loss, or the amount of
23 restitution, for that matter. It might affect the amount of
24 restitution, I guess.

25 Is that your sense?

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1 MR. OKULA: Yes, your Honor. We agree with that,
2 because the amount of the intended loss, in the government's
3 view, is tens of millions of dollars in excess of the
4 \$20 million cutoff period for the guideline range, that it's
5 irrelevant for a determination of the sentencing guidelines for
6 the imposition of punishment today.

7 We also note, and the Court appreciated through the
8 order your Honor entered, that there is a mechanism under the
9 United States Code that allows your Honor to determine
10 restitution within 90 days after imposing sentence, and that is
11 implicit in your Honor's directive that we have a hearing, if
12 necessary, next Tuesday.

13 I would just add that your Honor directed that we turn
14 over, for lack of a better phrase, the Downey report related to
15 the Mission Fine Wines. We did that this morning to
16 Mr. Verdiramo. We filed it also electronically with the Court.
17 I've also given the Court an update with respect to the William
18 Koch restitution issue.

19 THE COURT: Is that a fair statement, Mr. Mooney?

20 MR. MOONEY: Yes, your Honor. And I might add with
21 regards to the -- to Mr. Koch, as of a few hours ago, we
22 finally concluded and entered into a settlement agreement as
23 between Mr. Kurniawan and Mr. Koch with regards to their civil
24 issues and their issues as it relates to, I guess, also this
25 case.

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1 Mr. Koch is going to receive a consent judgment which
2 will be entered in the California case. There are some
3 additional things that Mr. Kurniawan has agreed to do once all
4 of the proceedings related to this case are completed, and
5 finished, and out of the way, and it is our understanding that
6 Mr. Koch is withdrawing his request to participate and receive
7 an order of restitution in this matter.

8 THE COURT: In fact, in the letter -- I did receive
9 Mr. Okula's letter this morning about both the report with
10 respect to Tuesday's possible hearing, and in that letter, the
11 last paragraph says, "With respect to the restitution claim of
12 William Koch, we have been informed by counsel for Mr. Koch
13 that he is withdrawing his claim of restitution in this
14 criminal proceeding, opting instead to pursue his remedies
15 against the defendant in California State court proceedings."
16 So that's compatible with what you have just said.

17 MR. MOONEY: That's the settlement that we just handed
18 in.

19 THE COURT: I'm going to say this again later, but
20 just so people understand, particularly what Mr. Okula was
21 saying: In sentencing, we always do a sentencing guidelines
22 analysis, even though the United States Sentencing Guidelines
23 are no longer mandatory. That's one of the factors to be
24 considered, not to be the determinative factor.

25 In order to do a thorough guideline analysis in a case

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1 like this, involving fraud, the Court has to make a
2 determination as to what, legally speaking, the loss has been
3 in the case. And as you will see in more detail soon, there
4 is, as is not uncommon, a disagreement between the defense, and
5 the government, and probation, by the way, as to what the loss
6 amount in this case is.

7 The sentencing guidelines have parameters that would
8 affect the sentencing guideline range. One parameter is I
9 believe it's 7 million to 20 million dollars in loss. That, I
10 think, is the defense position, that the loss falls there in
11 that range. And the government says that the loss falls in
12 excess of \$20 million, and the relevant range there is from 20
13 to up to 50 million dollars. So, if the loss, in fact, falls
14 in this latter range, that would have the tendency to increase
15 the offense level, and consequently increase the sentencing
16 guideline range of incarceration. So, that is a determination
17 that we will make during the course of the sentencing.

18 But in that regard, we are going to hear from -- since
19 the government on this issue bears the burden of proving by a
20 preponderance of the evidence what the loss amount is, why
21 don't I turn to you for this part of the presentencing
22 proceeding, Mr. Okula.

23 MR. OKULA: Thank you, your Honor. Do you wish me to
24 address from here or the podium?

25 THE COURT: Whatever you're more comfortable doing.

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1 Yes, that might be better.

2 MR. OKULA: I think at this point, your Honor, if I
3 may, we are down to an issue with respect to three victims,
4 because Mr. Koch has withdrawn his claim, because the defendant
5 is conceding the Devine claim, the Reid Buerger claim. What we
6 are left with is a dispute regarding the David Doyle claim, the
7 Michael Fascitelli claim, and the Andrew Hobson claim. And I'm
8 not going to go at length -- I know your Honor has budgeted a
9 half hour for this, your Honor -- but we have made extensive
10 submissions, and I respectfully submit that nothing that the
11 defense has submitted in response to our submissions and our
12 explanations about the bases for those restitution claims has
13 undercut, certainly by a preponderance of the evidence, the
14 government's proof establishing those claims. But I will
15 briefly review what the group is and give the Court a little
16 bit more evidence.

17 Your Honor, I would add, also, at the beginning that
18 to the extent that the Court has any concern about the
19 sufficiency or even the hearsay nature of the Twellman
20 affidavit, because that was one of the main oppositions that
21 the defendant advanced in trying to undercut the Twellman
22 affidavit --

23 THE COURT: And you're now talking about an affidavit
24 submitted on behalf of Mr. Doyle?

25 MR. OKULA: That's correct.

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1 So, just in summary, Susan Twellman, who testified at
2 trial with respect to the fake nature of, I believe, six
3 bottles of DRC of Mr. Doyle -- on behalf of Mr. Doyle --

4 THE COURT: Hold on just one second, Mr. Okula, just
5 so we make it clear. So, these three people -- Doyle,
6 Fascitelli and Hobson -- the reason we are devoting this extra
7 time to this proceeding is quite simple in this respect, that
8 if one accepts the government's proof simply with regard to
9 these three people, they would take us over the \$20 million
10 amount that I said before. So, this is not insignificant for
11 that. That would mean that the loss amount would exceed
12 \$20 million, it would still be less than \$50 million, but that
13 would have an impact on the guideline of sentence?

14 MR. OKULA: And it would also mean, your Honor, if we
15 have to get to that point, that we wouldn't have to get into
16 the area of to what extent could and should your Honor -- and
17 we respectfully urge your Honor and emphatically urge your
18 Honor -- that the other proof in the case demonstrates tens of
19 millions of dollars of intended loss, which separate and apart
20 from the actual losses, get us above the \$20 million amount for
21 guideline purposes.

22 But staying with the restitution figure, it's our
23 position, your Honor, that the Twellman affidavit, which relies
24 on an expert -- an ink expert that they employed who conducted
25 analysis of virtually every single bottle of the Doyle

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1 purchases from Mr. Kurniawan, for which he paid approximately
2 \$15.11 million, that virtually every one of those bottles was
3 fake.

4 Now, the determination in that regard, I realize that
5 we didn't set forth with jot and tittle all of the particular
6 aspects of that ink expert's analysis, nor do I think that it's
7 necessary. But, your Honor, the expert who conducted that
8 analysis is an individual named Barrett Deck. Mr. Deck has
9 been engaged in analysis of ink and labels for over 22 years,
10 and his analysis was that the nature of the labels that were on
11 the bottles purchased by Mr. Doyle from Mr. Kurniawan; that is,
12 that they were essentially of an ink jet type of printing that
13 was done, it was of a type that was not done at the time the
14 bottles were allegedly created. So, it's a simple analysis,
15 your Honor.

16 And I realize I'm giving more detail now than was set
17 forth in the four corners of our restitution submission for
18 Mr. Doyle, but even if you look at the four corners of our
19 submission, we spell out that Ms. Twellman swore under oath --

20 THE COURT: Let's do that, then. Let's look at what
21 you have submitted and summarize it.

22 MR. OKULA: She said under oath in her affidavit that
23 they retained this ink expert, and that this ink expert had
24 determined that this overwhelming high percentage of the Doyle
25 purchases -- and she did essentially the analysis of how much

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1 of the wine and determined that it was essentially 98 percent
2 of their purchases were fake based on that ink analysis by that
3 expert.

4 That standing alone, by a preponderance of the
5 evidence, for restitution purposes in this proceeding --

6 THE COURT: And for loss purposes.

7 MR. OKULA: Yes.

8 So, turning now from the Doyle claim --

9 THE COURT: So, that gets you to what dollar figure
10 for loss and/or restitution is the government asserting on
11 behalf of Mr. Doyle?

12 MR. OKULA: Well, even though the Koch claim is
13 withdrawn, we, of course, count the 2.1 million for Mr. Koch
14 for the loss purposes, adding the \$15 million for David Doyle,
15 that gets us to 17.1, adding the conceded \$1.5 million of Brian
16 Devine, that gets us to 18.6. And then adding what the defense
17 concedes is at least \$3 million of the Fascitelli claim, that
18 puts us over the \$20 million, your Honor.

19 So, what we're arguing about, then, is what portion of
20 the Fascitelli and the Hobson claims should also be counted.

21 So, let me turn to Mr. Fascitelli.

22 THE COURT: Before you do, you reduced the Doyle
23 amount somewhat. Why don't you explain that. I think you went
24 from 15.11 million to 15 million.

25 MR. OKULA: I just essentially rounded it down for the

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1 purpose of doing the math, your Honor, just now.

2 THE COURT: All right.

3 MR. OKULA: But by no means -- I submit, your Honor,
4 that that's the correct amount, the 15.11 amount.

5 THE COURT: Got you. OK. And now you're going to
6 Fascitelli?

7 MR. OKULA: Yes, your Honor, unless the Court has
8 further questions with respect to Mr. Doyle.

9 THE COURT: I don't. Incidentally, you will see, we,
10 too, as say the Court and Ms. Murray in particular, have gone
11 through the analysis of loss and done independently a
12 bottle-by-bottle analysis. So, we have a pretty good sense of
13 at least what we think are the loss amounts.

14 MR. OKULA: Turning, then, to Mr. Fascitelli, your
15 Honor, essentially the defendant's argument is that -- well,
16 let me back up a second.

17 As part of our submission, your Honor, we submitted
18 three reports of the government expert, Mr. Egan, Michael Egan.
19 And those three reports were analysis of what are known as
20 Cellar I, Cellar II, and the third report was --

21 THE COURT: You're talking now about the auctions --

22 MR. OKULA: Yes.

23 THE COURT: -- for Cellar I, Cellar II, and the third
24 is?

25 MR. OKULA: The third report, your Honor, was a

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1 stand-alone report of the \$5.5 million worth of Fascitelli
2 purchases from Mr. Kurniawan.

3 The confusion on the defendant's part, we respectfully
4 submit, is that they take the 69 percent figure that related to
5 the analysis of Cellar I or Cellar II, which is not part of the
6 \$5.5 million claim, and therefore, say that that amount should
7 be reduced or should serve as a reduction for the defendants --
8 for the Fascitelli claim.

9 But what should be understood by the Court is that the
10 analysis done by Mr. Egan of the \$5.5 million purchase was that
11 the overwhelming super high percentage and what he estimates is
12 90 percent of the wines that constituted that \$5.5 million
13 amount were determined by him to be fake.

14 So, our bottom line is this: You should not use a
15 69 percent figure to reduce the 5.5. At best, it should be a
16 10 percent reduction, which Egan says is an amount that is sort
17 of a conservative estimate of ones that he either positively
18 couldn't label as fakes or he wanted to have a conservative
19 estimate on what he could stand by and represent or essentially
20 have us represent in court. And it's the 90 percent figure.
21 So if you apply the math to that -- and in applying the math,
22 one important thing your Honor has to do is that it is conceded
23 that the defendant never delivered \$684,000 worth of bottles to
24 Mr. Fascitelli.

25 In doing the math, the defendant tried to apply their

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69 percent figure to the whole \$5.5 million amount. But our claim with respect to that is very simple: If the defendant promised to deliver \$5.5 million worth of wine and delivered, say, 80 percent of that wine, and 90 percent of that 80 percent was fake, and didn't deliver the \$684,000, but held onto that money, that's as much a part of the restitution and fraud claim as delivering phony wine, because the fraud claim is simple -- the victim here, Mr. Fascitelli, gave Mr. Kurniawan \$5.5 million and said give me that wine in exchange. The defendant agreed to do that. The fact that he didn't deliver some of the wine shouldn't serve to reduce his restitution claim.

So, if you apply the 90 percent math, your Honor, to the Fascitelli claim, so if you back out the 684,000, what you need to do is apply 90 percent to the \$4,816,000 figure analysis, and under that analysis, the total would be 5,018,400, and that consists of the 684,000, which you back out, plus 90 percent of the 4.816 million, which is 4,334,400. And if I haven't thoroughly confused you, your Honor, I'll run through it again for you.

THE COURT: I think I'm pretty clear, but you might run through it again just so everybody else --

MR. OKULA: Sure.

So we have the \$5.5 million at the outset, we're backing out 684,000, which leaves us with 4,816,000. The Egan

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1 analysis is that 90 percent of that is fraudulent. So, if you
2 apply 90 percent to the 4.816 million, you end up with
3 4,334,400. Then you add back in the amount that the defendant
4 promised to deliver, but never delivered, which is the 684,000,
5 which gives rise to a total of 5,018,400.

6 So that --

7 THE COURT: So, if you are correct there, between
8 Mr. Doyle and Mr. Fascitelli, you're over the \$20 million mark?

9 MR. OKULA: Indeed, your Honor.

10 THE COURT: And you were going to do Mr. Hobson, too,
11 I think?

12 MR. OKULA: Yes, very briefly.

13 Your Honor, we submitted the Hobson reports. Recall
14 that Mr. Fascitelli was a -- I'm sorry, Mr. Allan Frischman,
15 who was a government expert, conducted a posttrial analysis of
16 a representative sample of the Hobson bottles by going up to, I
17 believe, Greenwich, Connecticut, Mr. Hobson's residence, and
18 examining this representative sample, and looking at that
19 sample and extrapolating the analysis -- and an extrapolation
20 analysis, your Honor, is nothing new under restitution law. I
21 know your Honor is familiar with different areas of cases. I
22 happen to do principally criminal tax cases, and the law is
23 abundantly clear that if there is a solid methodology employed
24 in conducting a representative sample of a subset or a part of
25 the universe that is believed to be fraudulent, and there is a

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1 solid methodology in making the determination that a certain
2 percentage of those are frauds or fakes, then the Court is
3 perfectly entitled to rely on the extrapolation of that
4 representative sample to the whole amount in arriving at even a
5 restitution figure.

6 And that's what happened here, that Mr. Frischman
7 analyzed, I believe, 50 representative bottles, determined
8 through the elaborate notes that he made, which we submitted in
9 the report, and the detail of the bottles that he submitted,
10 which ones were fraudulent, which was well over 90 percent.
11 And so, when he applied the math, if you will, to what
12 percentage of the Hobson claim was fraudulent, thus entitling
13 Mr. Hobson to restitution, the bottom-line figure came out to
14 3,118,856.

15 Here, too, your Honor, there was an amount that the
16 defendant promised to deliver, but did not deliver and kept
17 Mr. Hobson's money, and that sort of has been a part -- that's
18 the 552,531 figure, and that is figured in, I believe, the math
19 that we did in arriving at the \$318,000 figure.

20 THE COURT: Just two comments I have:

21 The law of loss, so to speak, jurisprudence, says that
22 in order to figure out the actual and/or intended loss, first
23 of all, one needs to do no more than a reasonable
24 approximation, but nevertheless, in at least some of the
25 examples that you have been dealing with, for example,

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1 Mr. Doyle, Ms. Twellman, in addition to her affidavit, I
2 believe, attaches a bottle-by-bottle addendum to that affidavit
3 explaining how she arrived at her figure, and the same is done
4 in the Hobson case. There's also a, I don't know, four-page
5 description of what those bottles contain.

6 MR. OKULA: Indeed, your Honor. That was implicit in
7 my presentation that your Honor is familiar with, the
8 bottle-by-bottle analysis for both the Doyle claim as part of
9 the Twellman analysis and the Hobson claim as part of the
10 Frischman analysis.

11 So, your Honor, unless you have any further questions,
12 I know you'll let us have a chance to be heard again with
13 respect to the proper sentence, but we will rest on our papers
14 here.

15 THE COURT: Sure.

16 MR. OKULA: Thank you.

17 THE COURT: Mr. Mooney?

18 MR. MOONEY: Thank you, your Honor.

19 Your Honor, the difficulty with the Doyle claim, and
20 the reason that we had requested a Fatico hearing with regards
21 to Mr. Doyle's claim, is that we get sort of a claim that I
22 bought so many apples, then they turned into X number of
23 oranges; therefore, I'm entitled to be recompensed for all of
24 the original apples, and we don't even know how they got there.

25 Today, for the first time -- for the first time a few

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1 minutes ago, we're given the name of this paper expert who
2 apparently looked at the labels on the Doyle wine and now tells
3 us that these almost 2,000 bottles are counterfeit. We have
4 had no opportunity to follow up or check up on this person and
5 see what his credentials are. We have seen nothing in the way
6 of any kind of report. We have been given minimal information
7 with regards to how this individual went about to supposedly
8 doing the things that he was doing.

9 This is \$15 million. This isn't a 15,000, or 1,500,
10 or \$15 claim, this is a \$15 million claim that is being put
11 forth, and we know -- we don't know -- what we don't know is
12 from these 2,000 bottles that Ms. Twellman says that they took
13 and isolated when Mr. Kurniawan was arrested, we don't know how
14 that matches up with what was bought. We have been given a
15 schedule that shows the payment of the \$15.1 million. We have
16 that, so we know he paid \$15.1 million to buy wine. We don't
17 know how much wine and how many bottles that he bought. We do
18 know, when we look at it, that it goes back to quite an early
19 period of time.

20 It's somewhat incredulous to believe that in March of
21 2012, bottles purchased in 2005, 2006, 2007, 2008, all of those
22 bottles are available, could be collected, and put in the
23 warehouse, especially when wines matching the descriptions of
24 all of those show on the wine menus of Mr. Doyle's restaurants
25 in Australia, and that the comments that have been made in the

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1 social media with regard to those restaurants talk about
2 drinking them. There's discussions of drinking 1945 DRCs and
3 how wonderful the 1945 DRCs were when they drank them.

4 To believe that they somehow have all this wine, and
5 can collect it, and put it together is -- like I say, it just
6 doesn't work. It defies reality.

7 They don't tie Exhibit B to Exhibit A in any way. So,
8 we don't know what portion of Exhibit A is reflected in
9 Exhibit B, because when they pull together their Exhibit B, and
10 when they give us this list of wine that they've sent off to
11 this warehouse, they don't tell us what Mr. Doyle paid for the
12 wine.

13 Instead, what they tell us is what Mr. Doyle believes
14 that that wine would be worth today, which is about
15 \$19 million. Which, by the way, is kind of interesting when
16 Ms. Twellman is saying in her affidavit that somehow
17 Mr. Kurniawan has done significant damage to the fine wine
18 market, yet these 2,000 bottles, if they were authentic, would
19 be worth something closer to 20 million today instead of
20 15 million that they're claiming was even paid for them. So,
21 obviously there's been an appreciation, and we don't even know
22 how much more because we don't know -- we just don't know what
23 percentage and what portion those 2,000 bottles make up of the
24 total amount of bottles that were purchased.

25 And we, quite frankly, your Honor, have very low

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1 confidence in -- this isn't a wine expert, this is some kind of
2 an ink expert who came in and looked at things, and there's no
3 report. We don't know how many bottles he looked at, we don't
4 know what methodology was employed, we just don't have any of
5 that information, yet this is the most substantial claim that's
6 out there being made. It's completely insufficient for the
7 purposes of us even being able to adequately respond and to
8 deal with. And that's why we supplied copies of the wine menus
9 from the restaurants, to show what was there, and that's why we
10 asked for a Fatico hearing with regards to this, because we
11 ought to have an opportunity to look into it.

12 One of the things that keeps getting forgotten in all
13 of this: The government talks about the millions of dollars
14 that Mr. Kurniawan received from the sale of wines, and he did.
15 He got a lot of money from selling wines. But we have also
16 produced, and we gave your Honor the records that showed that
17 Mr. Kurniawan bought, and paid for, \$40 million worth of wine.
18 That's what he bought, and he collected all that.

19 Then, he sold wine. And the government has seized the
20 warehouse that Mr. Kurniawan had, and the government's expert
21 has told us that there is about \$3-1/2 million worth of wine in
22 that warehouse. Therefore, we know that over \$36 million in
23 wine purchased by Mr. Kurniawan was sold. It's a substantial
24 part of what went out in all of these sales.

25 Yet, now we have all of these people -- we have

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1 Mr. Doyle, and we have Mr. Fascitelli, and others that are
2 coming in -- that say, well, every bottle that I bought was a
3 counterfeit, virtually every bottle that I bought was a
4 counterfeit. This is easy, this is what I paid; therefore,
5 that's what I want back, and it doesn't match up with reality.

6 The other reality that it doesn't match up with is the
7 ability of this man to even have been able to create that. He
8 had phenomenal taste. He was able to recreate and put together
9 something which matched the taste of these fine wines. But
10 your Honor saw the pictures at trial. Your Honor saw the sink
11 in the house. Your Honor saw the little device that could be
12 used to put the corks in and to recork it. And granted, he had
13 all the labels that he might need, because it's as easy to
14 print 500 labels as five -- he had all the labels, he had all
15 those parts -- but putting together each of those bottles would
16 be a very time-consuming thing.

17 And we saw for ourself when the FBI came in and raided
18 the house, you know, three bottles soaking in the sink, a
19 couple of bottles sitting up on the counter. This is not a
20 production line that turns out thousands and thousands of
21 bottles, as the government would want us to believe, because
22 we've got \$40 million worth of stuff that he bought and is
23 reselling, and that's a big part of what goes out there.

24 And that's why when we look at some of the reports,
25 like Mr. Doyle says, OK, 69 percent of what was sold in these

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1 auctions was probably counterfeit. Those are more realistic
2 sorts of figures.

3 The Doyle figures -- the Doyle claim is insufficient.
4 We haven't been given enough information to be able to
5 adequately respond to it, and the Court hasn't been given
6 enough information even to make proper estimates with regards
7 to it. It's too big a claim, it's too important a claim, to be
8 accepted, and we ask the Court to reject that.

9 As to Mr. Fascitelli, again, it's the same sort of
10 difficulties. 5.5 million is what he says he paid for the
11 wine, yet somehow it's all bad.

12 And I am confused by the argument, because it was our
13 understanding that 5.5 million represents what Mr. Fascitelli
14 bought altogether. Well, he bought at some of these auctions.
15 In fact, when Mr. Egan testified, he put these slides up on
16 during trial, he tells us that the two big buyers were
17 Fascitelli and Koch. Those were the two big buyers that bought
18 at those auctions. And why would we be given all the reports
19 on Mr. Egan if the reports weren't covering Mr. Fascitelli's
20 purchases. That's what they were coming through for. Granted,
21 they don't say, they say it's a client, some unnamed client.

22 So the 69 percent is what we see when we look at those
23 reports, and it's -- quite frankly, it's a fair figure to
24 apply. We think it's an appropriate figure to apply, and we
25 think that it gives a fair number to Mr. Fascitelli.

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1 And we are willing -- we think, your Honor, that for
2 the purposes of loss calculation, wines that were never
3 delivered ought not to be counted for loss calculation. This
4 case was not about Mr. Kurniawan promising and not delivering
5 wines. This was a case about Mr. Kurniawan promising and
6 delivering the wrong wines. So, some of the wines that he did
7 were wrong. But we do agree that those numbers can come back
8 in for restitution purposes, because Mr. Kurniawan agrees that
9 he owes that money to people, they never got anything. We just
10 think that should be kept out.

11 So, that's why, when you look at our calculations, we
12 believe --

13 THE COURT: Do you have a number for Mr. Doyle and/or
14 a number for Mr. Fascitelli?

15 MR. MOONEY: We have no number for Mr. Doyle, your
16 Honor, because we have absolutely inadequate information to
17 work with. We just don't know. If you applied Mr. Egan's
18 figures, the 69 percent figure, the 69 percent of what
19 Mr. Doyle bought was also probably bad -- what would that give
20 us -- that would put us up around 8 or 9 million. But it's
21 just inadequate information to deal with. We're poking a stick
22 in the dark on Mr. Doyle.

23 As for Mr. Fascitelli, we do, your Honor, we claim
24 that the loss figure should be 3.3 million, but the restitution
25 should be 3,795,000. And like I say, for the 3,795,000, we've

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1 put that 684,000 back in. So we think that's a proper figure
2 for Mr. Fascitelli.

3 Mr. Hobson, we're having some of the same sort of
4 difficulties with. We were not able to adequately determine
5 from what we were given a proper way to really sort of put that
6 together and figure it out.

7 As a result, what we did do is we had -- we did have a
8 good expert report there, and the expert looked at, and
9 identified a bunch of bottles, and said here's the bottles that
10 we think are bad. Now, some of them, the bottles, he said,
11 well, I can't make an opinion on these, I don't know, I'm not
12 saying one way or the other. I don't think you can hold those
13 as bad bottles, but with regards to the ones that he listed as
14 being improper, we actually went through and found them in the
15 purchase receipts from Mr. Hobson, and we gave your Honor a
16 chart, and if you'll look at the chart, they come up to a total
17 taking up -- the ones that he had no opinion on, it's \$845,366.
18 To that, we added back -- we think the loss figure would be
19 845,000. We think the restitution figure, you add back in the
20 552,000 that he didn't receive, and it comes to 1,397,000.

21 The same rules that are required for the purposes of a
22 conviction or trial really don't apply in these proceedings,
23 but still, still, the real --

24 THE COURT: The burden of proof here is preponderance
25 of the evidence.

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1 MR. MOONEY: Correct. We're down from conviction.

2 And the evidence that's relied upon has to have some
3 reliability, and there's got to be a chain. It has to go, I
4 mean, A, B, C, D, E. You can't go A, B, C, E. And,
5 unfortunately, what we got when we're looking to some of these
6 claims that are being presented is a big gap. And when there's
7 a gap, we are not in a position where we can even confront it
8 and come forward, because there's just a gap there, the
9 information is insufficient. We deal in things that follow
10 logically from one point to another, and that requires that the
11 pieces be tied together.

12 And in the case of Mr. Doyle, they're absolutely not
13 tied together. In the case of Mr. Fascitelli, there is some
14 information that isn't there, but we can come to a conclusion
15 based upon the reports that are done. And in the case of
16 Mr. Hobson, there's information there that would support the
17 numbers that we have put forth.

18 So, we ask your Honor to use those numbers, your
19 Honor.

20 THE COURT: OK. Thanks.

21 Did you want a one-minute rebuttal?

22 MR. OKULA: Since we have the burden, just two
23 minutes, very briefly, your Honor, to respond to a couple of
24 the arguments that they perhaps are not worthy of response, but
25 I just wanted to beat the drum, nonetheless.

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1 With respect to the Twellman affidavit and the
2 underlying analysis done by the ink expert, I think I heard
3 Mr. Mooney say something to the effect of, well, that person
4 was just an ink expert. Well, so what? If that person
5 determines that laser jet printing was not used on those types
6 of wine bottles in Burgundy during those years, it's case over.
7 So you don't need a wine expert to come in to tell you that
8 those bottles are fake. Some person with particularized
9 knowledge and the ability to give you information like that
10 those -- that printing wasn't done is plainly sufficient.

11 The final thing, your Honor, is Mr. Mooney made the
12 argument essentially that they were hampered, they had a
13 complete inability to look into some of these claims. Now,
14 don't get me wrong, I'm not running away from our burden here,
15 I recognize we have the burden here, and I submit, most
16 respectfully, that we satisfied it overwhelmingly.

17 But the mere fact that we have the burden doesn't
18 hamper Mr. Mooney from using all the tools that he has
19 available to him to go out, to check these bottles himself.
20 After all, if there's one person in this courtroom who has the
21 ability to look at those bottles and determine whether they're
22 his fakes, you're not looking at that person, your Honor, he's
23 seated right there. So, if Mr. Mooney wanted to go up to look
24 at the Hobson bottles, all he had to do was ask your Honor for
25 the issuance of a 17(c) subpoena to get some of those bottles

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1 to look at them himself.

2 So, once again, your Honor, I'm not running away from
3 our burden. We demonstrated what we needed to demonstrate, but
4 to make the argument that they were completely hamstrung from
5 conducting any analysis themselves of any of these claims is
6 factually inaccurate.

7 Thank you.

8 THE COURT: So, I had one -- Mr. Mooney, did you want
9 one more --

10 MR. MOONEY: Yes. I just want to say, your Honor,
11 Ms. Twellman's affidavit is dated last week. This isn't
12 something that they produced and gave us a month or so ago when
13 there was time -- that's why we asked for a Fatico hearing, so
14 we could do things like this and take a look at it. It was
15 July 16th, and we are now the 24th.

16 THE COURT: So, I have one other question for the
17 government: On the victims, are you still of the view that
18 there are ten or more victims in a legal sense, or are you less
19 than that?

20 MR. OKULA: No. We are of the view that there are
21 more than ten, your Honor, because the people who were
22 victimized through, for instance, the purchases at the
23 auctions, who upon determining that these were fakes, that the
24 auction house took them back. Or when Kurniawan, the
25 defendant, consigned to the Chicago Hart Davis Hart, the

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1 distributor there, some of his wines for sale, essentially
2 asked them to act as his spokesperson to consign them for sale
3 to the public, they rejected them as fakes.

4 Those are as much victims as the people who actually
5 suffered out of pocket. And we submitted, your Honor, that
6 longer list of people who were victims of the defendant for
7 intended loss purpose. Now, they have been made whole because
8 they got reimbursement from the auction houses, but there are
9 plainly more than ten, yes, your Honor.

10 THE COURT: OK. So we are going to take a break now,
11 and then we will resume in about five or ten minutes. Thanks
12 very much.

13 MR. OKULA: Thank you, your Honor.

14 (Recess)

15 THE COURT: My inclination here, before this oral
16 argument and even now, is that the record is sufficient to
17 reach conclusions as to loss, restitution, et cetera, but my
18 practice has been, particularly in a criminal case, to go the
19 extra mile on behalf of the defense in a situation where the
20 defense has asked for further process and further hearing. So,
21 I am going to do that in this case as well.

22 We have already set a separate proceeding for Mission
23 Fine Wines. We will do the same for Doyle.

24 What exactly, Mr. Mooney -- or do you want to go off
25 the record and confer with counsel for the government and let

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1 me know who's needed, what's needed, you want to see the expert
2 for Doyle? Why don't you spend a minute with Mr. Okula.

3 (Pause)

4 MR. MOONEY: Your Honor, the government's going to
5 provide us with a copy of the expert report, which apparently
6 they have, and then I think we can decide from there whether
7 the expert needs to be present, or just Ms. Twellman, or both
8 of them.

9 THE COURT: And when -- you think it's feasible to do
10 this on the time we have set aside, on Tuesday?

11 MR. MOONEY: I have a little bit of a difficulty with
12 that, your Honor. I have --

13 THE COURT: Well, you talk to Mr. Okula, and obviously
14 if we are going to do it, we are going to do it at a time that
15 you can all be there.

16 MR. MOONEY: I have a hearing in a place called Heber,
17 Utah, on Wednesday morning, and I am not sure how I do a 2:30
18 afternoon hearing in New York on Tuesday and get to Heber,
19 Utah, by 8 o'clock Wednesday morning.

20 THE COURT: All right. When can you let me know what
21 you both decided in terms of a date?

22 MR. MOONEY: I think first thing tomorrow morning.

23 MR. OKULA: Yes.

24 MR. MOONEY: First thing tomorrow morning, your Honor.

25 THE COURT: OK. So I think that's the fairest thing

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1 to do. As I say, Mr. Okula, my tendency was to agree that
2 there is sufficient information in the record, but we will go
3 the extra step in favor of letting the defense get a crack at
4 the expert.

5 MR. OKULA: And we are happy to do that, your Honor.
6 In fact, I was going to offer it up at the beginning of our
7 presentation. I didn't know that it would be necessary or
8 required by the Court, but I had spoken to counsel for
9 Mr. Doyle, who has been the intermediary and working with us
10 diligently in connection with the Twellman and the Deck
11 information, and Ms. Twellman, I understood, would be available
12 next week, but we will agree with Mr. Mooney in the event -- or
13 settle some dates that we can present to the Court.

14 THE COURT: OK.

15 Mr. Mooney, you should also consider whether you want
16 to combine the Mission Wine with this, at the same time,
17 whenever that's going to be. It might be the most efficient
18 for you, who does the traveling.

19 MR. MOONEY: Delta would probably prefer us to have
20 two of them. I personally would prefer them to be a single
21 hearing.

22 THE COURT: So I'll hear from you tomorrow morning
23 with suggested dates. And there's one other matter that I
24 wanted to mention to particularly Mr. Okula.

25 I've asked you a couple of times about this issue of

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1 victims and the number of victims, because, like the loss
2 amount, the number of victims, whether it's ten or more or
3 whether it's fewer, also impacts the offense level, makes a big
4 difference, and consequently, that drives the sentencing
5 guideline range. I have obviously some question in my mind.

6 I would ask you, Mr. Okula, when you are considering
7 victim, are you also taking into account the application note
8 that applies to, I think it's 2B1.1? You don't have to answer
9 now. Take a look at that and see if that doesn't impact your
10 evaluation of the number of victims or the information that's
11 necessary to present in support of the number of victims.

12 MR. OKULA: I will indeed, your Honor. Thank you.

13 THE COURT: OK.

14 So, we are adjourned. We have a date. We will leave
15 it on the calendar for the moment, the Tuesday afternoon date,
16 just for purposes of good order, but it's anticipated that I
17 will hear jointly from you first thing tomorrow morning, OK?

18 Great. Thanks very much.

19 MR. MOONEY: Thank you, your Honor.

20 THE COURT: You bet.

21 (Pause)

22 THE COURT: Christine mentioned that you all have
23 proposed three dates. Of those, I would say the one that is
24 most sensible is August 4, it's a Monday.

25 I'm thinking, also, for you, Mr. Mooney, you might

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1 want to come on the Sunday, the day before, to be here,
2 obviously, or the Saturday might be easiest for you travel
3 wise.

4 So I think that's the date that makes most sense.
5 That works for everybody and all the people, the witnesses.

6 My plan -- I take it yours, also, both of you -- would
7 be that when we conclude this proceeding in the morning, we
8 would then move to sentencing, so that we would wrap it up on
9 the same day, right?

10 MR. OKULA: Very well. Yes, your Honor.

11 And I think we alluded earlier, and certainly to our
12 filing -- in our filing this morning, to the notion that as we
13 are providing additional information, we are continuing to have
14 conversations with the defense about, in light of the
15 additional information, whether a hearing is still necessary.
16 Should we ultimately reach a decision in some regard, either
17 with regard to the Doyle claim or the Mission Fine Wine claim,
18 that the witnesses are not necessary, that the defense does not
19 wish a hearing on that, I assume we can alert the Court, and
20 then we can proceed to the sentencing at the earlier time that
21 day?

22 THE COURT: On the same day?

23 MR. OKULA: Yes, same day.

24 THE COURT: Absolutely.

25 MR. OKULA: The start time.

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1 THE COURT: We will absolutely reserve -- well, yes, I
2 think we will stick with that. I was going to say it can even
3 be earlier than that, perhaps, but we're splitting hairs in
4 terms of how much time is available.

5 So, yes, 8/4 is devoted to you. And we would do the
6 hearing at, let's say, 9:30, we'll shoot for 9:30 on the 4th.
7 And if, as Mr. Okula is pointing out, something else happens,
8 and you don't need to have a hearing, we will do the sentencing
9 at 9:30. How's that?

10 MR. MOONEY: We always try to be as accommodating and
11 helpful as we can, your Honor.

12 THE COURT: And me, too.

13 All right. Great.

14 MR. OKULA: Just for point of clarification, your
15 Honor, do we understand correctly that your Honor has heard
16 enough with respect to Fascitelli and Hobson, and that that
17 issue, for your matter, you obviously have to announce where
18 you're at that, but there is nothing additional your Honor
19 wants on those?

20 THE COURT: I'm comfortable that I have enough
21 information. I think, as Mr. Mooney pointed out, that the
22 amount in question for Doyle is so significant, that it kind is
23 the most important that we do.

24 MR. OKULA: Understood, your Honor. Thank you.

25 THE COURT: All right. Thanks so much.

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1 MR. MOONEY: Thank you, your Honor.

2 THE COURT: You bet.

3 MR. VERDIRAMO: Thank you, your Honor.

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